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Phazaluddin bin Abu v Jadadish Chandra a/l Bipin Chandra (Majlis Peguam Malaysia, intervener)

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(A)-1575–07 OF 2018
HAMID SULTAN, HANIPAH FARIKULLAH AND KAMALUDIN MD SAID JJCA
4 MARCH 2020

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Legal Profession — Disciplinary board — Complaint against advocate to disciplinary board — Respondent found guilty of misconduct by disciplinary board — High Court allowed respondent's appeal — Whether there was sufficient basis for disciplinary board to find respondent guilty under s 94(3)(m) of the Legal Profession Act 1976

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This was an appeal against the decision of the learned High Court judge in allowing an appeal by the respondent against the decision of the disciplinary board pursuant to s 103E of the Legal Profession Act 1976 ('the LPA'). The appellant had been charged with a number of charges under s 41(a) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 and was tried at the Sessions Court Kuala Lumpur. The appellant appointed the respondent as his lawyer in the conduct of those charges. At the end of the trial, the session court convicted the appellant for all the charges and sentenced the appellant to four years imprisonment. The appellant thereafter appealed however was dismissed by the High Court. Following the release of the appellant after serving sentence, he raised the issue of the bail money with the respondent and since the issue was not settled by the respondent, the appellant made a written complaint with the disciplinary board against the respondent. The essence of the complaint was that the respondent had misused the bail money of RM200,000 which was deposited into the respondent's client's account/stakeholder account without the consent or mandate from the appellant. The disciplinary board found the respondent guilty of misconduct under s 94(3)(m) of the LPA. Being aggrieved with the decision of the disciplinary board, the respondent appealed to the High Court. In concluding that there was no misconduct by the respondent, the learned High Court judge came to the conclusion that the disciplinary board seriously misdirected themselves in finding that there was a charging of fees in the absence of a written agreement in respect of professional services rendered which it deemed grossly excessive. Hence, this appeal by the appellant. The issue for consideration was whether there was sufficient basis for the disciplinary board to find the respondent guilty under s 94(3)(m) of the LPA.

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Held, dismissing the appeal and affirming the order of the High Court:

(1) The issue of the fees being grossly excessive was never put to the respondent during his cross-examination nor was the same was submitted upon by the appellant. Accordingly, no such finding should be made by the disciplinary committee. The total fees of RM117,500 charged by the respondent, considering his seniority and the intricacies of the money laundering charges numbering four in total, the duration of the sessions court trial lasting well over two years, and the appeal that took one and one half days to argue was not grossly excessive. Therefore, the learned High Court was correct in his conclusion that the legal fee of RM100,000 was not excessive. Thus, the learned High Court judge rightly held that the disciplinary committee did not state the basis upon which it reached a finding that the legal fees of RM100,000 was grossly excessive and amounting to an act of misconduct under s 94(3)(m) of the LPA 1976. Therefore, the finding by the disciplinary committee could not be sustained and was rightly set aside by the learned High Court judge. Finally, the disciplinary committee seriously misdirected themselves in finding that there was a charging of fees in the absence of a written agreement in respect of professional services which the disciplinary committee deemed grossly excessive (see paras 32 & 34–36).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan hakim Mahkamah Tinggi yang bijaksana dalam membenarkan rayuan oleh responden terhadap keputusan Lembaga Tatatertib berdasarkan s 103E Akta Profesion Undang-Undang 1976 ('APU'). Perayu telah didakwa dengan sejumlah tuduhan berdasarkan s 41(a) Akta Pencegahan Pengubahan Wang Haram dan Pencegahan Pembiayaan Keganasan 2001 dan dibicarakan di Mahkamah Sesyen Kuala Lumpur. Perayu melantik responden sebagai peguamnya dalam mengendalikan pertuduhan tersebut. Pada akhir perbicaraan, mahkamah sesyen mensabitkan perayu atas semua tuduhan dan menjatuhkan hukuman penjara empat tahun kepada perayu. Perayu selepas itu membuat rayuan namun ditolak oleh Mahkamah Tinggi. Berikutan pembebasan perayu setelah menjalani hukuman, dia mengemukakan isu wang jaminan dengan responden dan kerana masalah itu tidak diselesaikan oleh responden, perayu membuat aduan bertulis dengan lembaga tatatertib terhadap responden. Dasar aduan tersebut adalah bahawa responden telah menyalahgunakan wang jaminan sebanyak RM200,000 yang dimasukkan ke dalam akaun klien/akaun pihak berkepentingan responden tanpa persetujuan atau mandat dari perayu. Lembaga tatatertib mendapati responden bersalah melakukan kesalahan di bawah s 94(3)(m) APU. Terkilan dengan keputusan Lembaga Tatatertib, responden merayu ke Mahkamah Tinggi. Dengan menyimpulkan bahawa tidak ada salah laku oleh responden, hakim Mahkamah Tinggi yang bijaksana menyimpulkan bahawa lembaga tatatertib telah tersalah arah apabila mendapati bahawa terdapat pengenaan

yuran semasa ketiadaan perjanjian bertulis berkenaan dengan perkhidmatan profesional diberikan yang dianggap sangat berlebihan. Oleh itu, rayuan ini oleh perayu. Isu untuk pertimbangan adalah sama ada terdapat asas yang mencukupi untuk lembaga tatatertib untuk mendapati responden bersalah di bawah s 94(3)(m) APU.

Diputuskan, menolak rayuan dan mengesahkan perintah Mahkamah Tinggi:

(1) Isu bayaran yang terlalu berlebihan tidak pernah diajukan kepada responden semasa pemeriksaan balas dan perkara yang sama juga tidak diajukan oleh perayu. Oleh itu, tidak ada penemuan yang harus dibuat oleh jawatankuasa tatatertib. Jumlah bayaran berjumlah RM117,500 yang dikenakan oleh responden, memandangkan tempoh perkhidmatan dan kerumitan tuduhan pengubahan wang haram berjumlah empat, tempoh perbicaraan mahkamah sesyen yang berlangsung lebih dari dua tahun, dan rayuan yang memakan masa satu setengah hari untuk berhujah tidak terlalu berlebihan. Oleh itu, hakim Mahkamah Tinggi yang bijaksana adalah betul dalam kesimpulannya bahawa yuran guaman sebanyak RM100,000 adalah tidak berlebihan. Dengan itu, hakim Mahkamah Tinggi yang bijaksana dengan tepat berpendapat bahawa jawatankuasa tatatertib tidak menyatakan asas di mana ia membuat keputusan bahawa bayaran undang-undang sebanyak RM100,000 adalah sangat berlebihan dan berjumlah kepada tindakan salah laku di bawah s 94(3)(m) APU. Oleh itu, penemuan oleh jawatankuasa tatatertib tidak dapat dipertahankan dan dengan tepat diketepikan oleh hakim Mahkamah Tinggi yang bijaksana. Akhir sekali, jawatankuasa tatatertib telah tersalah arah dengan serius dalam mendapati bahawa terdapat pengenaan yuran semasa ketiadaan perjanjian bertulis berkenaan dengan perkhidmatan profesional yang dianggap oleh jawatankuasa tatatertib sangat berlebihan (lihat perenggan 32 & 34–36).]

Cases referred to

Au Kong Weng v Bar Committee, Pahang [1980] 2 MLJ 89, FC (refd)
Bradshaw v Medical Board of Western Australia (1990) 3 WAR 322, SC (refd)
Choe Kuan Him, Advocate & Solicitor, Re [1976] 2 MLJ 207, FC (refd)
D'Allesandro v Legal Practitioners Complaints Committee (1995) 15 WAR 198, SC (refd)
Datuk M Kayveas & Anor v Bar Council [2013] 5 MLJ 640, FC (refd)
Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaren a/l N Gopal (Majlis Peguam, intervener) [2018] 2 MLJ 265, FC (refd)
Majlis Peguam v Cecil Wilbert Mohanaraj Abraham [2019] 5 MLJ 159, FC (refd)

Legislation referred to

Anti-Money Laundering and Anti-Terrorism Financing Act 2001 ss 4(1), 41(a)

Bankruptcy Act 1967 s 33(6)(a), (6)(b), (6)(b), (6)(c), (6)(e), (6)(f), (6)(h), (6)(k), (6)(l)

Legal Profession Act 1976 ss 94(3), (3)(m), 103(1), 103D(1), 103E

Appeal from: Originating Summons No WA-17D-20–07 of 2017 (High Court, Kuala Lumpur)

Ramasamy (Lim Ram & Assoc) for the appellant.
K Selvi (J Rajaretnam with her) (Adha Selvi & Assoc) for the respondent.
Bernard Scott (Sault Scott & Co) for the intervener.

Hanipah Farikullah JCA:

INTRODUCTION

[1] The appellant in these proceedings appeals against the decision of the learned High Court judge, given on 19 July 2018 whereby the learned judge allowed an appeal by the respondent against the decision of the disciplinary board pursuant to s 103E of the Legal Profession Act 1976 ('the LPA 1976').

[2] This matter came before the High Court as an appeal by the respondent against the findings and order of the disciplinary board. The disciplinary board in question reached its findings on 17 June 2017 and found the respondent guilty of misconduct under s 94(3)(m) of the LPA and ordered the respondent to pay a penalty of RM5,000 within a month from the date of the order and default thereon the respondent shall be suspended pursuant to s 103(1) of the LPA as an advocate and solicitor until payment of penalty.

[3] At all material times, the respondent was an advocate and solicitor in the law firm Messrs Arbain & Co.

THE RELEVANT LAWS

[4] The complaint made by the appellant against the respondent is of professional misconduct. Pursuant to s 103E of the LPA, any party aggrieved by the decision of the disciplinary board shall have the right to appeal to the High Court.

[5] The court through s 94(3) of the LPA, exercises supervisory roles over ethical conduct of legal practitioners. The court has exercised its powers from time to time in relation to legal practitioners against whom complaints are

alleged. There is a number of cases on what does or does not amount to professional misconduct by advocates and solicitors under the LPA (see: *Datuk M Kayveas & Anor v Bar Council* [2013] 5 MLJ 640; *Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaren a/l N Gopal (Majlis Peguam, intervener)* [2018] 2 MLJ 265; *Majlis Peguam v Cecil Wilbert Mohanaraj Abraham* [2019] 5 MLJ 159; *Au Kong Weng v Bar Committee, Pahang* [1980] 2 MLJ 89; *Re Choe Kuan Him, Advocate & Solicitor* [1976] 2 MLJ 207).

[6] Section 94(3) of the LPA contains provisions on the meaning of 'misconduct' on the part of an advocate and solicitor bearing in mind that they are not exhaustive definitions but rather examples of what is intended to be included within the meaning of the terms used. Section 94(3) provides as follows:

(a) conviction of a criminal offence which makes him unfit to be a member of his profession;

(b) breach of duty to a court including any failure by him to comply with an undertaking given to a court;

(c) dishonest or fraudulent conduct in the discharge of his duties;

(d) breach of any rule of practice and etiquette of the profession made by the Bar Council under this Act or otherwise;

(e) being adjudicated a bankrupt and being found guilty of any of the acts or omissions mentioned in paras 33(6)(a), (b), (c), (e), (f), (h), (k) or (l) of the Bankruptcy Act 1967;

(f) the tendering or giving of any gratification to any person for having procured the employment in any legal business of himself or any other advocate and solicitor;

(g) directly or indirectly procuring or attempting to procure the employment of himself or any other advocate and solicitor through or by the instruction of any person to whom any remuneration for obtaining such employment has been given by him or agreed or promised to be so given;

(h) accepting employment in any legal business through a tout;

(i) allowing any unauthorised person to carry on legal business in his name without his direct and immediate control as principal or without proper supervision;

(j) the carrying on by himself, directly or indirectly, of any profession, trade, business or calling which is incompatible with the legal profession or being employed for reward or otherwise in any such profession, trade, business or calling;

A (k) the breach of this Act or of any rules made thereunder or any direction or ruling of the Bar Council;

(l) the disbarment, striking off, suspension or censure in his capacity as a legal practitioner in any other country or being guilty of conduct which would render him to be punished in any other country;

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(m) the charging, in the absence of a written agreement, in respect of professional services rendered to a client, of fees or costs which are grossly excessive in all the circumstances;

C (n) gross disregard of his client's interests; and

(o) being guilty of any conduct which is unbefitting of an advocate and solicitor or which brings or is calculated to bring the legal profession into disrepute.

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[7] The role of the court on hearing an appeal under s 103E of the LPA was explained in *Dinesh Kanavaji a/l Kanawagi & Anor v Ragumaren a/l N Gopal (Majlis Peguam, intervener)*. That case concerned an appeal from the disciplinary board against a finding of professional misconduct by the E appellant. His Lordship, Prasad Abraham FCJ observed at para 22 as follows:

> All these cases enunciate the point that the DC and/or like bodies, being a collegiate of peers, must be allowed to make findings of fact based on their experience in the profession under any given circumstances. The court must certainly not substitute themselves in the position of DC in its review role. It is not for the court to say on F the facts that the offending solicitor is guilty of professional misconduct or otherwise. So arguments on the merits should not be enunciated by the court and strong credence must be given to the findings of the DC which after all are subject to review by the DB which also consists of peers.

G **[8]** An appellate court will only interfere with facts and recommendations of the disciplinary committee in a limited situation as referred in para 23 in *Dinesh Kanavaji* which states as follows:

> [23] We have considered the report of the DC and find there are no compelling H grounds to interfere with its findings. The court should only interfere with the finding of facts and recommendations of the DC in the following limited circumstances ie:
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> (a) when the findings are manifestly perverse;
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> I (b) The DC/DB had failed as right thinking members of the Bar to give due consideration to the facts of the case and the conduct of the solicitor complained against; and
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> (c) there had been a breach of natural justice.

[9] If we may add, the approach of the Supreme Court of Western Australia Court in determining an appeal against a finding of professional misconduct is that expressed by Rowland J in *Bradshaw v Medical Board of Western Australia* (1990) 3 WAR 322. That case concerned an appeal form the Medical Board against a finding of professional misconduct on the part of the appellant. The observed at p 335 that the appellate tribunal must decide:

> whether those facts (found by the Medical Board) constituted conduct which amounted to professional misconduct. In doing so (the appellate tribunal) would have to assess what weight to give to the decision of the Board and, with respect to those who suggest otherwise, (it) would start off wanting to give great weight to the views of members of the Board, composed as they are of members of the profession who had been appointed to the Board for the simple reason that they are members of the profession unless the facts or views are such that (the appellate tribunal) is unable to accept either the facts as found or the views as expressed. To do otherwise is to avoid the whole purpose of having a specialist tribunal appointed for the purpose. That is not to suggest that (the appellate tribunal) could not, and should not, overturn their decision if, after having considered the whole of the evidence, (the appellate tribunal) believed that the decision was wrong.

THE BACKGROUND FACTS

[10] As to the facts of the present case, in general, they are not in dispute. The appellant has been charged with a number of charges under s 41(a) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 at several Sessions Courts at Shah Alam, Batu Pahat, Seremban and Kuala Lumpur. The appellant was tried for all offences at the Sessions Court Kuala Lumpur.

[11] It is not disputed that the appellant appointed the respondent as his lawyer in the conduct of those charges. At the end of the trial, the sessions court convicted the appellant for all the charges against the appellant and sentence the appellant to four years imprisonment.

[12] The appellant thereafter appealed against the decision of the session court on the conviction and sentencing to the High Court. The High Court after hearing the submission of the appellant dismissed the appeal of the appellant.

[13] We turn to consider the complaint that the appellant had made to the disciplinary board and how they were dealt with by the disciplinary committee and the disciplinary board.

THE COMPLAINT

[14] In this case, the complaint alleged against the respondent was the subject of the report lodged by the appellant, the client of the respondent.

[15] Following the release of the appellant after serving sentence, he raised the issue of the bail money with the respondent and since the issue was not settled by the respondent, the appellant made a written complaint with the disciplinary board.

[16] On 25 September 2014, the appellant filed a complaint with the disciplinary board against the respondent. The essence of the complaint is that the respondent has misused the bail money of RM200,000 which was deposited into the respondent's client's account/stakeholder account without the consent or mandate from the appellant in that:

(a) the respondent took upon himself a sum of RM100,000 as legal fees; and

(b) the balance of RM100,000 was disbursed and/or forwarded to a third party, namely 'Season Square Bookshop'.

[17] For the purpose of the present appeal, it is important to understand the complaint in detail. The appellant's complaint against the respondent are as follows:

(i) I like to place a complain to the disciplinary board about my bail money of RM200,000.00 (Two Hundred Thousand) which was held by Mr Chandra. (Jadadish Chandra).

(ii) The sum of RM200,000.00 was my bail money, deposited in Maybank, cawangan Jalan Duta under the name of En Salleh Gommo.

(iii) Upon my conviction, En Salleh Gommo who was my bailer withdrew the bail money and handed to Mr Chandra to be held as my stakeholder. The bail money was raised by me.

(iv) Mr Chandra visited me in prison on the 1st week on my conviction (on 11th May 2011) during the visit, he told me that En Salleh Gommo has withdrawn the bail money and handed over to him after taking the interest money for himself as a token of appreciation. I had no objection to it.

(v) During the visit, I instructed Mr Chandra to hand over the cash or RM200,000.00 to my wife in Kluang. I provided him with my wife's contact information. Mr Chandra has asked me to inform my wife to contact him as he will be busy and wouldn't have the time to do so. And when my wife visited me in the same week, I have asked her to call Mr Chandra for the same purpose as per my instruction to Mr Chandra.

(vi) During my discussion with Mr Chandra about the cash, he was asking me to allow him to take some cash for himself he said he need additional fees.

(vii) In the beginning, I was reluctant as he personally requested RM30,000 for the High Court matter and that I had paid him that amount.

(viii) With regards to the RM30,000.00 fee which I have paid to Mr Chandra, I paid the amount by cash and several installment cheques, but there were

one or two cheques that I couldn't meet, so I have paid him in cash by banking in into his personal Maybank account. And the returned cheques were not returned to me and none of my payments to him was acknowledged by any receipts.

(ix) There was not a single payment acknowledgment or receipt that has been issued to me for any amount paid to Mr Chandra which include the fee of approximately RM52,000.00 (fifty two thousand) which I have paid him to represents me during my trial in the session court (Mahkamah Sesyen Jenayah Satu).

(x) Back to the time when the discussion was held during Mr Chandra's visit to the prison, as I said I was reluctant to allow him to take any money from the RM200,000.00. Finally, after much persuasion from him, I agreed that he take RM20,000.00 which I intended to give to En Salleh Gommo for helping me.

(xi) Mr Chandra told me that En Salleh Gommo had done nothing, and that he was the one who deserved t and asked me to increase the offer, and finally I have verbally agreed for him to take RM30,000.00 (thirty thousand) from that amount and pay the balance to my wife.

(xii) On another occasion, when my brother visited me, I was told that the money handed to my sister Balkees Binti Abu which was done without my consent.

(xiii) Mr Chandra had totally ignored my instruction of him when he visited me and handed the cash to 3rd party without my consent.

(xiv) I was told that an amount of RM100,000.00 (One Hundred Thousand) was paid to her. I am very much sure that this was done without my consent.

(xv) If it is true that the has not received any cash as alleged, then how could he pay RM100,000.00 to my sister Balkees Binti Abu without my consent and issue an indemnity letter to her with my name clearly stated in that letter of indemnity.

[18] The respondent was given notice of the contents of the reports and invited to respond. The relevant respondent's reply to the appellant's complaint is as follows:

1. Phazaluddin was charged for several offences under Section 4(1)(a) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 at Shah Alam, Batu Pahat, Seremban and Kuala Lumpur Sessions Court. The charges were laid in April and May 2008 and eventually all charges were tried in one trial, ie at the Kuala Lumpur Sessions Court.

2. The complainant was convicted and sentenced to 4 years imprisonment by the Sessions Court Judge, Kuala Lumpur.

3. On instructions, an appeal was filed to the High Court and after a hearing that lasted one and a half days, the Complainant's appeal against conviction and sentence was dismissed.

4. The bailor for the Kuala Lumpur case was En Salleh Gomu (now Datuk Paduka Salleh Gomu).

5. The Complainant's statement that Datuk Paduka Salleh Gomu had withdrawn the bail money before I visited the Complainant at the Kajang Prison on 11.05.2011 is not true and neither is the Complainant telling the truth that during the said visit he instructed me to hand over the cash of RM200,000.00 to his wife in Kluang nor that I had been provided with information on his wife.

6. As a matter of fact, the Complainant had marital problems with this wife even whilst the trial was ongoing. His wife is a medical doctor and had, by the time the Complainant was in prison, filed divorce proceedings in the Syariah Court in Kluang. Hence it is untrue for the Complainant to now say that he had instructed me to hand over the cash of RM200,000.00 to his wife in Kluang.

7. It is also not true that the Complainant paid me a sum of RM30,000.00 for the High Court appeal. The Complainant's allegation that he had paid me a fee of approximately RM52,000.00 for the trial in the Sessions Court, Kuala Lumpur is also not true.

8. I categorically deny that the Complainant had agreed to pay me RM30,000 from the bail money and also deny that the Complainant asked me to pay the balance to his wife.

9. The Complainant further says that I had asked him to sign some papers. However, to say that he cannot now remember what was signed due to depression and pressure of being in prison beggars believe. If the Complainant cannot remember what was in writing, how is it that he can recall all other verbal instructions and discussions with me?

10. The bail money amounting to RM200,000.00 was withdrawn by Datuk Paduka Salleh Gomu circa 10th July 2011. It was not in mid May 2011 as the Complainant seems to suggest. Further, why did the Complainant not instruct his bailor, Datuk Paduka Salleh Gomu to release the entire bail money to him directly by crediting the same into his personal account or into the wife's account. There was a valid reason to release the same through my firm, ie to pay my agreed fees of RM100,000.00.

11. The Complainant's allegation that I handed the cash to a 3rd party without his consent is untrue. I had the Complainant's mandate and instructions to pay Balkees Binti Abu, the Complainant's sister, a sum of RM100,000.00 as seen in my firm's letter dated 13.07.2011, and in her emails to me dated 06.07.2011, my reply email dated 07.07.2011 and her emails dated 07.07.2011 and 10.07.2011. The last email clearly confirmed that the Complainant's sister, Balkees Binti Abu, had received the amount on behalf of her brother, the Complainant.

12. The payment of the sum of RM100,000.00 to Balkees Binti Abu vide MBB Cheque No.341744 payable to SEASON SQUARE BOOKSHOP was explicitly made on the undertaking of Balkees Binti Abu that in the event of any claim, suit or action being commenced by the Complainant or any party claiming under him against Arbain & Co in respect of the said payment, Balkees Binti Abu will indemnify my firm to the full extent of the sum paid to her together with any interest and cost that may be imposed; see letter dated 13.07.2011 from Arbain & Co to Balkees Binti Abu attached to the Record of Complaint.

13. The Complainant's statement that he had no way of contacting me as he was only entitled to call once a week and could only use the phone for 5 minutes per call is without basis. There are numerous other ways of communicating with me including writing officially to me but the Complainant did not do so. He could have even utilised the one call per week opportunity to reach out to me.

14. The Complainant's statement that his family did not receive a single cent out of the money is also without basis. As seen in my firm's letter dated 13.07.2011, a sum of RM100,000.00 was paid to the Complainant's sister, Balkees Binti Abu. Is she not a member of the Complainant's family? As the Complainant has not said anything about this sum of money released to his sister, it is presumed that she had the Complainant's instructions and/or mandate. If that be the case, she should also have the instructions and/or mandate to pay my fee of RM100,000.00 now the subject matter of this complaint.

15. The Complainant's allegation that his brother called over to meet me to demand the cash is denied. I had already released the balance of the bail money, a sum of RM100,000.00, to the Complainant's sister and the Complainant was and is fully aware of the same. They have made no issue of the same in this Complaint.

16. The matter of the RM200,000.00 bail money was first raised by the Complainant in June 2014. It was raised through a letter dated 09.06.2014 from Messrs Lim Ram & Associates. It is noted that vide the letter dated 09.06.2014, the full bail money totaling RM200,000.00 was demanded despite the Complainant's admission in his complaint dated 22.09.2014 that he had agreed to pay me a sum of RM30,000.00. The Complainant cannot approbate and reprobate.

THE EVIDENCE BEFORE THE DISCIPLINARY COMMITTEE

[19] The proceedings before the disciplinary committee took place on 4 March 2016 and concluded on 6 May 2016. In this regard, the complainant gave evidence on his behalf and the respondent and one Salleh Gomo (RW1) gave evidence for the respondent.

[20] In this present case, it is relevant to look at the evidence before the

disciplinary committee:

16.1) Testimony of the Complainant (PW1)

16.1.1) Examination-in-chief (PW1)

a) The Complainant has alleged that he has RM200,000.00 of his bail money which is held as stakeholder with the respondent and wanted the sum to be refunded but the respondent refuses to refund the same.

b) The Complainant however agree to pay an additional sum of RM30,000.00 to the respondent being legal fees for the High Court Appeal.

c) The Complainant alleges that he has given instructions to the respondent to release the bail sum of RM200,000.00 to his wife when the respondent first visit him in prison in May 2011.

16.1.2) During cross-examination (PW1)

a) The Complainant agrees to the suggestion that there were married problems between him and his wife was seeking a divorce with him but that was after one year he was imprisoned.

b) The Complainant agrees that he only complained about the refund of bail money in June 2014 after three years after the money is taken out.

16.2) Testimony of Datuk Paduka Mohammad Salleh bin Gomu (RW1) Examination-In-Chief

16.2.1) RW1 states that he knows the complaint through Din.

16.2.2) Din has requested him to use his name to be the bailor and deposited the sum of RM200,000.00.

16.2.3) After some time, Din calls RW1 that the money is to be withdrawn. RW1 withdrew it in the presence of Din and the Complainant's sister one Balqees.

16.2.4) Balqees wanted the money. Din told RW1 that the money was required to be paid to the lawyer for fees. RW1 gave a call to the respondent and placed the said sum into the respondent's clients account with instructions 'your bill has not been paid. I leave it to you to deal with the money'.

16.2.5) The word 'stakeholder' was never mentioned to him.

16.2.6) He has always been dealing with Din and never ask the Complainant for instructions.

Cross-examination (RW1)

16.2.7) Mr Din did not tell him how much legal fees is to be paid.

16.2.8) The total sum withdrawn is RM208,000.00. He deposited RM200,000.00 to the Respondent's Clients Account while the balance of RM8,000.00 being interests was given to him.

16.3) Respondents (RW1) testimony

Examination-in-Chief

16.3.1) The Complaint was introduced to him by Salleh Gomu and by Datuk Subramaniam.

16.3.2) The Appeal was heard in 2011 and the decision was handed down on 5.5.2011.

16.3.3) He visited the Complainant on 11.5.2011 to enquire whether the Complainant wanted to appeal the decision to the Court of Appeal.

16.3.4) There were 3 different bailors, Datuk Salleh Gomu, the complainant sisters Balqees Binti Abu and a business partner of the Complainant.

16.3.5) He met the Complainant 3-4 occasions when the Complainant was in prison.

16.3.6) On these occasions the Complainant never mentioned the bail money.

16.3.7) To his knowledge the bail money was given by Din to Datuk Salleh Gomu.

16.3.8) He denied that the Complainant has instructed him to release the bail money to the Complainant's wife.

16.3.9) He denied that he has received the sum as stakeholder.

16.3.10) There were no conditions laid by Datuk Salleh Gomu except that he said to deal with the same and to take the fees from the bail money and to release the balance to the Complainant's sister.

16.3.11) The bail money was received on7.7.2011.

16.3.12) The legal fees was agreed at RM150,000.00 but the Complainant had not paid the full fees.

16.3.13) He only received payment of RM17,500 as fees from the Complainant.

16.3.14) He denied that he demanded another RM30,000.00 from the Complainant.

16.3.15) The Complainant came to visit him sometime in January or February 2014 after being released from prison. The Complainant did not raise any issue regarding the bail money.

16.3.16) The Complainant sister Balqees informed him that the Complainant's summons needs to be settled. He has the

Complainant consent and by the Complainant, subsequent conduct in not raising the matter is sufficient evidence of the Complainant's consent.

16.3.17) The respondent has the Complainant's mandate as during the trial the Complainant told him that any payments to be made and or to receive to liaise with his sister as she is the one with authority. During the trial, there were issues with his partners and he asked that they may assist by forwarding payments to his sister.

During Cross-Examination (RW2)

16.3.18) The respondent has agreed with the suggestion that it was orally agreed that his fees would come from the bail money.

16.3.19) There was no written letter on what he had done with the bail money.

16.3.20) The Complainant has not produced any evidence that the bail money is his. The money is placed in the client account because it comprised partly the legal fees and partly the monies to be paid to the Complainants sister.

16.3.21) Q: As a counsel do you think it is prudent to get the mandate is writing?
A: Not necessary. When you do a criminal case, your client has full faith in you. I have no reason to doubt his oral instructions. All the mandates are given orally.

16.3.22) The outstanding summons is it with the government?
Yes, including SSM.

16.3.23) Have you seen the summons?
I have seen it but Balqees have them.

16.3.24) I put it to you that you issue this letter (Exhibit B1) because you do not have any mandate nor has Balqees have any mandate?
A: Disagreed.

Re-examination (RW2)

16.3.25) There was only an oral agreement as to the fees.

16.3.26) Q: Was there receipts given to the Complainant?
A: Yes

16.3.27) The two payments of RM2,500 and RM5,000 were payments made by the Complainant for the Sessions Court matter and not the High Court. The High Court fees would come from the bail money.

DISCIPLINARY COMMITTEE REPORT FINDINGS

[21] The findings of the disciplinary committee can be summarised as follows:

(i) *Whether the bail sum of RM200,000.00 which had been deposited with the Respondent belongs to the Complainant?*

The Complainant has failed to produce proof that the bail money of RM200,000.00 belongs to him.

The respondent has produced Datuk Paduka Salleh Gomu (RW1) who was the bailor as a witness. According to Salleh Gomu (RW1), one Encik Din has deposited the bail money to him. It was Din who then informed him to withdraw the bail amount and to bank in the money in the Respondent's Clients account with instructions 'that I leave it to you all to deal with the money'. Encik Din also told Encik Salleh that the bail money was required to pay to the lawyer for fees.

(ii) *Whether the sum of RM200,000.00 has been deposited with the Respondent as stakeholder?*

The sum of RM200,000.00 was deposited in the Respondent's clients account with an instruction to settle the Respondent's legal fees and the balance for the respondent's to deal with the money.

Although Salleh Gomo did not state that the Respondent is holding the bail money as stakeholder but since the money is deposited with an instruction to deal with money, the Respondent is in fact holding the money as stakeholder.

(iii) *Whether the Complainant has instructed the Respondent to deal with the RM200,000.00?*

The respondent has alleged that he has only received a verbal mandate form the Complainant of legal fees which is payable and that he has received verbal instructions from the Complainant to deal with the Complainant's sister.

Further, on the other hand, the Complainant alleged that the has given instructions to the respondent to hand over the bail money to the Complainant's wife during the prison visit on 11/5/2011.

The Complainant's allegation is an afterthought and is not supported by corroborative evidence ie the Complainant's wife was not called as witness in the proceedings and the Complainant and his wife went through a divorce proceeding on 2012 and it is highly unlikely that he would instruct for payment of the bail money to be given to his wife.

(iv) *Whether there is any agreement between the parties as to the legal fees which is payable and whether the fees charged is grossly excessive?*

The respondent states that there is an oral agreement that fees are payable. The respondent however did not produce any bills for fees or receipts for the legal fee.

The Complaint alleges that he has agreed orally to pay RM30,000.00 as additional legal fees as he has already paid RM52,000.00 for the Sessions Court matter. The Complainant has produced proof of payment of RM

17,500.00 only.

We are aware that agreement for legal fees need not be in writing. However, it has to be reasonable based on the work done and complexity of the case.

As both parties have alleged that legal fees payable is based on the oral agreement, the Respondent should have drawn a bill and forward the same to his client. Further the Respondent has failed to produce any receipts for the RM100,000.00 of fees that he has received.

[22] After hearing the witnesses and perusing the exhibits and considering written submissions made by both parties, the disciplinary committee made the following recommendations to the disciplinary committee:

(a) there is no evidence tendered that the bail money belongs to the complainant. The bailor Salleh Gomu confirmed that the money belongs to one Encik Din which is not rebutted by the complainant;

(b) the respondent was a stakeholder when the bail money is deposited with him as the money was deposited with the instruction for settlement of fees and for him to deal with the money;

(c) that Salleh Gomu has testified before the disciplinary committee that the bail money belongs to one Encik Din and Encik Din has instructed that the money is to be deposited with the respondent for settlement of legal fees due and for the respondent to deal with the money;

(d) the respondent has admitted that no bill was issued for the legal fees as the complainant agree orally to payment of legal fees of RM100,000 and no receipts are prepared. This practice is irregular as the respondent is under a duty as a stakeholder to deal with the bail money.

As there is a dispute on the amount of fees due, the respondent should have an agreement in writing as to fees due and deliver a bill and a receipt as proof that the parties are agreeable to the number of fees which is due.

Section 94(m) of the LPA provides that 'where the charging in the absence of a written agreement in respect of professional services rendered to a client of fees or costs which are grossly excessive in all circumstances' is categorised as misconduct; and

(e) there is merit in the complaint as regards to the charging in the absence of a written agreement in respect of professional services rendered of fees and costs which are grossly excessive in all circumstances.

[23] The disciplinary committee recommended the imposition of a fine of RM5,000 against the respondent.

[24] The disciplinary board after consideration of the report of the disciplinary committee and in accordance with s 103D(1) of the Act, made an

order dated 17 June 2017 affirming the finding and the recommendation of penalty by the disciplinary committee.

DECISION OF THE HIGH COURT

[25] Being aggrieved with the decision of the disciplinary board, the respondent appealed to the High Court for the following orders:

(a) the decision of the disciplinary board dated 17 June 2017 to be set aside; and

(b) the penalty of the fine of RM5,000 be set aside.

[26] In concluding that there was no misconduct by the respondent, the learned High Court judge focused on the findings of fees by the disciplinary committee. Having found that there was no evidence tendered that the bail money belongs to the complainant, the learned High Court judge came to the conclusion that the disciplinary board seriously misdirected themselves in finding that there was a charging of fees in the absence of a written agreement in respect of professional services rendered which it deemed grossly excessive.

ISSUES

[27] In relation to the charge, the disciplinary committee found that there was in fact no evidence that the stakeholder money belongs to the appellant. However, the disciplinary committee decided that there was merit in the complaint as regards to the charging, in the absence of a written agreement, in respect of professional services rendered to a client, of fees or costs which are grossly excessive in all the circumstances.

[28] The only question that we have to decide is whether there are sufficient basis for the disciplinary board to find the respondent guilty under s 94(3)(m) of the LPA.

DECISION OF THIS COURT

[29] Learned counsel for the appellant challenged the decision of the learned High Court judge primarily on the following grounds:

(a) the respondent cannot deal with the stakeholder money until and unless the 'client' is first ascertained and a mandate is sought from the said 'client'. In this regard, the respondent is using the RM100,000 for himself as legal fees and releasing the sum of RM100,000 to a third party, namely 'Season Square Bookshop', is certainly in breach of duty as solicitors and the rules enshrined in the LPA 1976; and

(b) the learned High Court judge has misdirected himself in that he has taken upon himself in the fixing of the legal fees for the respondent and condoned the payment of RM100,000 to the third party.

[30] Learned counsel for the respondent resists these arguments. Learned counsel for the respondent emphasised that in this case, the appellant did not complain whether the sum charged by the respondent was excessive. It was contended for the respondent that the real issue before the disciplinary committee was whether the respondent had used the client's money which was deposited in the stakeholder's account without authorisation of the appellant.

[31] While charging, in the absence of a written agreement relating to client fees or costs which are grossly excessive will generally be regarded as professional conduct, in this present case, the appellant has not persuaded us as to why the learned High Court's conclusion was wrong. We are of the view that the learned High Court judge rightly considered the following evidence:

(a) the bail money of RM200,000 was given by one 'Din' and the disciplinary committee had also found on fact that the appellant had failed to prove that the said RM200,000 was his;

(b) based on the email dated 10 July 2011 from Balkees, an agreement had been reached to pay the respondent's legal fees of RM100,000;

(c) the respondent had the conduct of the several charges faced by the appellant under s 4(1) of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 at the Sessions Court, Kuala Lumpur for a period of two years; and

(d) the respondent also handled the appellant's appeal to the High Court.

[32] On the professional misconduct point, a perusal of the complaint report reveals that the appellant did not in fact present his case on the basis that the fees of RM100,000 was grossly excessive. In this present case, it is significant to note that the disciplinary board was not urged by the appellant to inquire whether the sum charged by the respondent was excessive or unreasonable. The complaint against the respondent was that he had used the bail money without any agreement from the appellant. We observed that the issue of the fees being grossly excessive was never put to the respondent during his cross-examination nor was the same was submitted upon by the appellant. It seems to us such an inquiry by the disciplinary committee stretches outside the scope of these proceedings. Accordingly, no such finding should be made by the disciplinary committee.

[33] Be that as it may, the inquiry into what amounts to be grossly excessive or unreasonable costs would ordinarily involve, firstly, a determination of what,

in the particular circumstances, would be a reasonable sum to charge. The resolution of that question would often turn on multiple factors, including the amount at which the costs in question was or would likely be taxed, the difficulty of the case, the novelty or complexity of the legal issues presented, the experience of the practitioner, the quality of his or her work, the amount of time spent by the practitioner on the matter, the responsibility involved, the amount or value of the subject matter in issue, and any costs agreement that might have been entered into (see *D'Allesandro v Legal Practitioners Complaints Committee* (1995) 15 WAR 198).

[34] We agree with the submission of learned counsel for the respondent that the total fees of RM117,500 charged by the respondent, considering his seniority and the intricacies of the money laundering charges numbering four in total, the duration of the sessions court trial lasting well over two years, and the appeal that took one and one half days to argue is not grossly excessive. In fact, the disciplinary committee had not explained why the legal fees is said to be excessive. Therefore, we find that the learned High Court was correct in his conclusion that the legal fee of RM100,000 is not excessive. Reference must be made to s 94(3)(m) of the LPA 1976 which provides as follows:

> For purpose of this part, 'misconduct' means conduct or omission to act ... by an advocate and solicitor in a professional capacity or otherwise which amounts to grave impropriety and includes — (m) in charging, in the *absence of a written agreement*, in respect of professional services rendered to a client, of fees or costs *which are grossly excessive* in all the circumstances.

[35] Thus, the learned High Court judge rightly held that the disciplinary committee did not state the basis upon which it reached a finding that the legal fees of RM100,000 was grossly excessive and amounting to an act of misconduct under s 94(3)(m) of the LPA 1976. Therefore, the finding by the disciplinary committee cannot be sustained and was rightly set aside by the learned High Court judge.

[36] Finally, we also found that the disciplinary committee, having found that there is no evidence tendered that the bail money belongs to the appellant, seriously misdirected themselves in finding that there was a charging of fees in the absence of a written agreement in respect of professional services which the disciplinary committee deemed grossly excessive.

[37] In our judgment, the learned High Court judge did not err in concluding that the disciplinary board order should be set aside.

A CONCLUSION

[38] For the reasons mentioned above, we are out of the opinion that professional 'misconduct' under s 94(3)(m) of the LPA has not been proven against the respondent. The right order would be to dismiss this appeal. The order of the High Court is affirmed.

[39] We thank counsel for their assistance.

Appeal dismissed and order of High Court affirmed.

Reported by Nabilah Syahida Abdullah Salleh